

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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FILE: B-182931

DATE: August 6, 1975

MATTER OF: Lasko Metal Products, Inc.

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## DIGEST:

1. Where bid sample failed to conform to solicitation requirement, it was properly rejected notwithstanding protester's contention that similar non-conforming item was accepted under prior procurements using same specification and that protester was therefore misled by contracting agency since bidder failed to resolve question concerning applicability of specification in writing as advised by agency.
2. Allegation that bid sample of successful bidder fails tests required by solicitation is without merit where agency technical personnel rendered positive determination of compliance and record does not indicate such judgment was without an adequate basis.

Lasko Metal Products, Inc. has protested the rejection of its bid sample for items 34-46, and the acceptance of another bidder's sample for the same item under solicitation FPGA-S-55493-A-10-21-74, issued September 9, 1974, by the General Services Administration, Federal Supply Service.

The solicitation called for bids for various specified electric fans. Items 34-46 were for a 16-inch oscillating desk fan, in accordance with Interim Federal Specification W-F-00101H, as amended August 22, 1972. Bid samples were required for evaluation in accordance with paragraph 3.12, Workmanship, and in accordance with the requirements of paragraph 3.4.4.1. The solicitation provided that bid samples would be evaluated to determine compliance with all characteristics listed for examination, and that failure to conform to all such characteristics would require rejection of the bid.

Paragraph 3.4.4.1, in its current form, requires that the "guard shall be metal and shall enclose the entire face, perimeter and reverse side of the blades and associated moving parts." The paragraph also provides that the guard shall not contact the blade assembly nor shall it show permanent distortion when tested in accordance with paragraph 4.3.5. Paragraph 4.3.5 provides for a test procedure in which a steel shaft weighing 50 pounds is to be placed

over randomly selected areas of the fan guard so as to exert a force of 50 pounds over a 4-inch diameter area and, when rotated by hand, the blades are not to come in contact with the fan guard. Moreover, a torque of 20-pound feet is to be applied to the blades in order to determine compliance with paragraph 3.4.5.1, which provides that the blades shall show no displacement from the hub assembly upon application of 20-pound feet in the plane of blade rotation.

Bids on items 34-46 were received from three bidders. However, the bids of the protester and Patton Electric Company, the low and second low bidders, respectively, were rejected when it was determined that their bid samples failed to comply with various sections of the foregoing specification provisions. Accordingly, award was made to Hunter Division of Robbins & Myers, Inc, whose sample was determined to comply with the specification requirements.

The administrative record shows that both the Lasko and Patton samples for items 34-46 were rejected, inter alia, because their fan guards were not metal as required by paragraph 3.4.4.1, but were of metal and plastic construction by virtue of a plastic centerpiece in the fan guard on the front of the fan. The protester's sample also experienced cracking in the hub assembly when subjected to the 20-pound foot torque test performed to determine compliance with paragraph 3.4.5.1.

The protester's objections to GSA's action may be summarized as follows:

(1) The rejection of its fan guard for failure to be entirely metal was improper because a "metal guard" in the eyes of the trade permits a plastic "ornamental" centerpiece. More importantly, it is alleged that GSA so interpreted the term when it accepted a Frigid fan under the same specification in a 1973 procurement which contained a similar plastic centerpiece, and Lasko was purportedly advised by GSA, prior to bidding, that no deviations from the specification were granted for the Frigid fan. Thus, since the Frigid fan (with its plastic centerpiece) was allegedly considered by GSA to be in compliance with paragraph 3.4.4.1, so must Lasko's model.

(2) The torque test requirement of paragraph 3.4.5.1 was not listed as a criterion by which bid samples were to be evaluated.

That contention notwithstanding, Lasko submits that the test was for possible displacement of blades from hub, that the failure found was not displacement but merely a cracking which does not render the fan inoperative, and that Lasko's fan therefore was not subject to defect envisioned by that test.

(3) The fan of the successful bidder, Hunter, was nonconforming in two respects:

(a) If the torque test of paragraph 3.4.5.1 is construed to be one of the bid sample acceptance criteria, it is contended that the Hunter blade does in fact experience displacement from the hub assembly when subjected to the torque test.

(b) The guard sturdiness test of paragraph 4.3.5 was performed by Lasko on "a Hunter Fan" and the protester determined that the guard would deflect, interfere with, and preclude blade rotation. Lasko contends that the Hunter fan passed this test only because agency technical personnel supported the back of the guard near the motor to keep the plane of the blade horizontal, and such action was evidence of partiality to the Hunter fan.

Finally counsel for Lasko submits that its contentions are borne out by proposed GSA specification revisions for such fans which, if adopted, will dispense with the requirement for a metal fan guard, and in performing the fan guard test of paragraph 4.3.5, no supports are to be placed underneath the guard itself during the test. According to the protester, the requirement of paragraph 3.4.4.1 for an all metal guard was both unnecessary and unduly restrictive of competition by restricting the bidding to one contractor whose prices were unreasonably high.

With regard to the composition of the fan guard, we do not accept Lasko's contention that paragraph 3.4.4.1 may be so construed to permit a guard of partially plastic components. The requirement that the guard "shall be metal and enclose the entire face" clearly means that metal components enclose all areas of the face. A plastic centerpiece of several inches in diameter, as included in the Lasko fan, would not satisfy this specification requirement since a portion of the guard enclosing the face would not be metal. (The contracting agency's technical personnel have explained that the use of a plastic centerpiece in the center of the guard presents a potential safety hazard should the plastic break due to impact or misuse.)

The protester insists that a "Frigid" fan accepted in previous year procurements under the identical specification had a similar plastic centerpiece, and that GSA personnel advised the protester that no deviations were granted therefor, indicating to the protester that a fan containing a similar centerpiece would be considered in compliance with paragraph 3.4.4.1.

In an affidavit submitted by the protester, reference is made to contacts with GSA personnel in May, June and July 1974, when Lasko personnel were purportedly assured by GSA quality representatives and by one of GSA's buyers that no deviations had been granted for the Frigid fan. However, it is admitted in the affidavit that when Lasko displayed its model to GSA engineers, emphasizing it would be virtually identical to the fan it was going to supply in response to the solicitation, the engineers would not discuss the specifications with Lasko, but advised the protester to submit in writing any questions concerning the specifications. By letter of August 2, 1974, Lasko did in fact submit written questions regarding the specifications, but none addressed the metal guard requirement of paragraph 3.4.4.1. In view thereof, we cannot conclude that GSA misled Lasko concerning the centerpiece, or that Lasko reasonably relied on the general comment that no deviations had been permitted.

If we are to assume, as the protester contends, that GSA did in fact accept a fan containing a plastic centerpiece in prior year procurements under the identical specification, but for which no deviations were granted, we do not concur that such actions would affect the legality of the rejection of Lasko's article under the instant procurement. At best, the acceptance of non-conforming articles under prior contracts may cloud the legality of those awards (not under protest by Lasko), but may not compel procuring officials to accept non-conforming items under a current solicitation.

Concerning the torque test of paragraph 3.4.5.1, which the protester contends was not expressly listed by the solicitation as a criterion against which bid samples were to be evaluated, GSA points out that while the torque test was not referenced on page 7, paragraph 3.4.4.1 references the test criteria of paragraph 4.3.5, which in turn refers to paragraph 3.4.5.1. In any event, since the bid sample was properly rejected under paragraph 3.4.4.1 for failure to possess an all-metal fan guard, it is not necessary that we further consider this basis for rejection.

With regard to the allegation that the Hunter bid sample failed to comply with the requirements of paragraphs 3.4.5.1 and 4.3.5, the record indicates that GSA technical personnel determined to the contrary after subjecting the Hunter fan to those tests.

With regard to the evaluation of bid samples, it has been the position of this Office that procurement officials are better qualified than our Office to review and evaluate the sufficiency of bid samples to determine whether they comply with solicitation criteria, and we therefore will refrain from taking exception to such determinations unless the record establishes that such judgments were without

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an adequate basis. See B-176210, February 2, 1973; Boston Pneumatics, Inc., B-181760, November 15, 1974. As stated by Lasko, GSA technical personnel admitted to supporting the back of Hunter's guard near the motor in the course of performing the test set out in paragraph 4.3.5.

Subsequently, by letter dated July 8, 1975, GSA reported that the Hunter fan preproduction sample, which is identical to the Hunter bid sample, passed the test specified in paragraph 4.3.5 under circumstances in which the round base of the fan was held by hand to prevent the fan's rotation and a block of wood was placed under the fan's motor to keep the fan blades' rotation plane horizontal. GSA reports that at no time did this block of wood come into contact with or directly support the fan guard; that a 50-pound weight was placed directly on the fan guard at various locations; that the fan was tested in accordance with the specified paragraph; and that at no time during these tests did the guard come in contact with the fan blades.

In addition to the foregoing, GSA states that the Central Office Quality Control Division also retested Hunter's bid sample on July 7, 1975, even though it was felt that the guard may have been somewhat weakened by the original testing. Again, the fan guard was not directly supported in any manner. Once again, the Hunter fan passed the specified test.

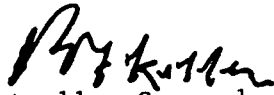
In view of the foregoing, we find no basis to conclude that the Hunter fan was not properly tested.

While the proposed revisions to the applicable specifications, which were submitted to the protester and others in the industry for comment, may tend to support certain aspects of the protest, we do not view them as controlling since they have not been adopted and are not applicable to the instant procurement and there is no certainty as to their final form. In this connection, we have been advised by GSA that its quality control personnel have not yet approved the proposed specification.

As for the allegation that the requirement for an all-metal guard resulted in an unreasonably high price from the only bidder complying therewith, the record reveals that a price analysis was performed on Hunter's prices for items 34-46, and due to various inflationary factors pertaining to both material and labor, Hunter's prices were considered fair and reasonable under the circumstances. Whether a bid is reasonable as to price is a determination to be made by the procuring activity, and our Office will not interfere absent a showing that the determination was arrived at arbitrarily or capriciously. B-177476, May 14, 1973. It is our conclusion that the record adequately documents the determination, and that it was not arbitrary or capricious.

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Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States